IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 23, 2008

STATE OF TENNESSEE v. MACEO LAJUAN PARKER

Direct Appeal from the Criminal Court for Davidson County
Nos. 2006-C-2041, 2006-C-2070 Steve Dozier, Judge

No. M2007-00552-CCA-R3-CD - Filed September 22, 2008

In case no. 2006-C-2041, Defendant, Maceo Lajuan Parker, was indicted in count one for possession with intent to sell or deliver 0.5 grams or more of cocaine, a Class B felony, and in count two for simple possession of marijuana, a Class A misdemeanor. In case no. 2006-C-2070, Defendant, in a joint indictment with co-Defendants Olen Lovelle Marcus, Jr. and Ian Colby Jones, was charged in count three for possession with intent to sell or deliver 0.5 grams or more of cocaine, in count four for simple possession of marijuana, and in count five for possession of drug paraphernalia. Defendant entered a plea of guilty in case no. 2006-C-2041 to the lesser included offense of attempted possession of under 0.5 grams of cocaine, a Class D felony, with an agreed sentence of two years as a Range I, standard offender, and the State agreed to enter a nolo prosequi as to count two. Defendant entered a plea of guilty in case no. 2006-C-2070 to possession of over 0.5 grams of cocaine with an agreed sentence of eight years as a Range I standard offender, with such sentence to be served consecutively to his sentence in case no. 2006-C-2041. As part of the negotiated plea agreement, the State entered a nolo prosequi as to counts four and five of the indictment. Following a sentencing hearing, the trial court imposed the agreed sentences of two years in case no. 2006-C-2041, and eight years in case no. 2006-C-2070. The trial court ordered Defendant to serve his sentences consecutively because he was on bond when he committed the offense in case no. 2006-C-2070, for an effective sentence of ten years. See T.C.A. § 40-20-111(b). The trial court denied Defendant's request for alternative sentencing, and ordered Defendant to serve his sentences in confinement. In his appeal, Defendant challenges the trial court's denial of his request for alternative sentencing. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Michael A. Colavecchio, Brentwood, Tennessee, for the appellant, Maceo Lajuan Parker.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Amy H. Eisenbeck, Assistant

District Attorney General; and Tammy H. Meade, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The State recited the following factual basis in supported of Defendant's pleas of guilty at the guilty plea submission hearing:

> In [2006-C-2070], had this case gone to trial, the State's proof would've [sic] shown that, on May twelve, [2006], here in Davidson County, North Crime Suppression Unit was involved in a drug investigation. A confidential informant purchased a quantity of cocaine from [co-]Defendant Jones, and this was out of a hotel room that had been rented by Defendant. Jones had the buy money on him, when he was later taken into custody. Jones was observed exiting Room [301] and going to room [225]. And at that time his co-Defendant was taken into custody. At the same time, [Defendant] was observed leaving Room [225] with another co-defendant, Marcus. The officer approached [Defendant] on the second level, and [Defendant] and Marcus were taken into custody. A bag containing white powder, a bag containing cocaine, a bag containing marijuana, and digital scales were recovered on the ground next to [Defendant]'s car keys. And [Defendant] did admit that the hotel room [226] [sic] was his room.
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> In [2006-C-2041], had that case gone to trial, the State's proof would've [sic] shown that on March seventh, [2006], here in Davidson County, [Defendant] was stopped because the computer showed that he had an outstanding warrant. He was arrested and searched incident to arrest. A bag of cocaine was found in the center console. It weighed approx – it weighed four-point-two grams. And the Defendant's vehicle was then seized, along with [$872.00] from his person. And they did find that the Defendant had no job.

At the sentencing hearing, the State entered Defendant's presentence report, as amended by Defendant's request, to reflect that Defendant had earned his GED. According to the presentence report, Defendant was twenty-eight years old at the time of the sentencing hearing. Defendant stated that he was single, but he had one son and enjoyed being a father. Defendant has not been employed since leaving high school in the eleventh grade except for jobs obtained at a construction company through the work release program in 2001. Defendant reported various jobs as a short-order cook while he was a teenager. Defendant stated that he attended the School of Audio Engineering from April 26, 2005, until May 11, 2005, when he was arrested for a probation violation.

Defendant reported the use of alcohol and marijuana from the age of sixteen until he was incarcerated on the current charges. Defendant stated that he attended the "New Avenues Program"

from July 2006 until his graduation from the program in December 2006. Defendant attended AA/NA meetings during this time. Defendant graduated from the "Lifelines" program while incarcerated in 2004.

According to the presentence report, Defendant was convicted of simple assault and simple possession of drugs in 1997 when he was eighteen years old. Defendant was granted judicial diversion for the assault conviction and placed on probation for eleven months, twenty-nine days. His probation was subsequently revoked. Defendant was sentenced to thirty days for his drug conviction.

Defendant was again convicted of simple possession of drugs in 1998. He was sentenced to eleven months, twenty-nine days, all of which was suspended, and Defendant was placed on supervised probation.

In 2000, Defendant was convicted of felony evading arrest and theft of property valued between $10,000 and $60,000. Defendant was sentenced to three years for his theft conviction, and two years for his felony evading arrest conviction, to be served concurrently. Defendant's sentences in both cases were suspended, and Defendant was placed on probation.

In 2002, Defendant was convicted of possession of cocaine and sentenced to five years. Defendant's sentence was suspended after service of six months in confinement, after which Defendant was released into the community corrections program. Also in 2002, Defendant was convicted of possession of a weapon by a convicted felon. Defendant was sentenced to one year for his weapon conviction, all of which was suspended after service of six months, and Defendant was placed on probation.

In 2003, Defendant was again convicted of felony possession of cocaine and sentenced to five years. Defendant was released into the community corrections program in October 2004. His probation for this offense was revoked on June 8, 2005. In 2005, Defendant was convicted of possession of less than 0.5 grams of cocaine in Davidson County Criminal Court, case no. 2003-B-1400, but the presentence report does not indicate Defendant's sentence for this offense.

Eric McAnally testified on Defendant's behalf at the sentencing hearing. Mr. McAnally stated that he was employed by World Entertainment Conglomerate and served as Defendant's manager to help Defendant develop a career in music. Mr. McAnally said that Defendant was in the "development stages," and had gathered enough material to produce two albums. Mr. McAnally believed that Defendant had the type of personality that an audience would appreciate, and that Defendant now had "the opportunity to have the tools and the access to do what it takes to go to the next level."

Mr. McAnally acknowledged that it ultimately came down to Defendant "making better decisions and personal choices in his life." Mr. McAnally said that he would not have attended Defendant's sentencing hearing if he did not hate "to close the door on him and his career." Mr.

McAnally said that if Defendant was granted probation, he would be able to continue with his musical career.

On cross-examination, Mr. McAnally said that Defendant was not paid by the company, although the company paid for Defendant's studio rentals. Mr. McAnally acknowledged that he would not be compensated for his services until Defendant earned money as a musician. Mr. McAnally agreed that Defendant's musical career did not prevent Defendant from securing employment. Mr. McAnally explained that finding a job was "something [Defendant had] to take upon himself to do," and that Mr. McAnally was just "affording [Defendant] an opportunity to do something else beyond that." Mr. McAnally said that Defendant was scheduled to perform his first musical show at a local nightclub on the night of the date when he was arrested.

Mr. McAnally said that he was aware of Defendant's criminal history, at least since 2004 when he met Defendant. Mr. McAnally acknowledged that he had a prior federal drug conspiracy conviction, and that was why he had "compassion for where [Defendant] is today."

In response to the trial court's questions, Mr. McAnally described Defendant's music as an expression of his life as a drug dealer and the hardships "that come along with that." Mr. McAnally acknowledged that probationary guidelines would prevent Defendant from associating with convicted felons, and "that would be some circumstance that [he and Defendant would] have to talk [about] to his probation officer." Mr. McAnally assured the trial court that he did not want to violate any of Defendant's probationary guidelines should Defendant be granted probation. Mr. McAnally said that Defendant was not aware of Mr. McAnally's prior conviction. On redirect examination, Mr. McAnally clarified that there were other individuals in the company who could help Defendant with his musical career.

Defendant made a statement in his own behalf. He acknowledged that he had violated probation "a number of times," and that he had made bad decisions. Defendant said that music was his life, and he believed he could succeed in that field. Defendant said, however, that he had a "back-up" plan, and wanted to finish his training as an audio engineer. Defendant said that his prior actions were immature, but he now realized that if he were granted probation, he would "have to fly straight because any slip-up would put [him] back into this position again." Defendant asked the trial court for one more chance to correct the mistakes he had made.

At the conclusion of the sentencing hearing, the trial court noted that the length of Defendant's sentences in case nos. 2006-C-2041 and 2006-C-2070 had been agreed upon as part of the plea negotiations. The trial court stated, however, that it would "still mention some of the enhancing, mitigating factors, [because] – even though it is an agreed-upon sentence – because they relate to factors that I can consider and would weigh, in terms of the sentencing considerations, as to how the sentence should be served."

The trial court acknowledged Defendant's music career as a mitigating factor but did not place much significance on these endeavors. See T.C.A. § 40-35-113(13). The trial court observed

that Defendant was arrested on the drug charge before his first performance, indicating that Defendant placed more weight on his drug transactions than his musical career. The trial court recognized Defendant's history of prior criminal convictions and his four prior probation violations as enhancement factors. See id. § 40-35-114(1), (8).

The trial court found that the amount of drugs sold increased with each of Defendant's convictions, and that with the last charge in case no. 2006-C-2070, he had rented a motel room for the purpose of selling cocaine. The trial court also observed that Defendant had been granted alternative sentencing on prior convictions but had demonstrated no willingness to comply with the terms of his probation. Based on these considerations, the trial court found that confinement was necessary to protect society and that Defendant had exhibited a lack of potential for rehabilitation. Accordingly, the trial court denied Defendant's request for alternative sentencing and ordered him to serve his effective sentence of ten years in confinement.

II. Request for Alternative Sentencing

Defendant argues that the trial court improperly considered the statutory enhancement factors in considering Defendant's request for alternative sentencing because the length of his sentences was agreed upon as part of the plea negotiations. Defendant also contends that the trial court erred in denying his request for alternative sentencing because Defendant submits that the record does not support the trial court's finding that he has a long history of criminal conduct. Defendant argues that an alternative form of sentencing which required probationary supervision would be the least severe measure necessary to address the State's and trial court's concern "involving rehabilitation for substance abuse."

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court form which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correction, however, "'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)). "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. Carter, 254 S.W.3d at 345 (quoting State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1002); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004)).

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement

and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(5), (6) (emphasis added). Additionally, a trial court is "not bound" by the advisory sentencing guidelines; rather it "shall consider" them. Id. § 40-35-102(6).

No longer, therefore, is any defendant entitled to a presumption that he or she is a favorable candidate for probation. Carter, 254 S.W.3d at 347. Generally, defendants classified as Range II or Range III offenders are not to be considered as favorable candidates for alternative sentencing. T.C.A. § 40-35-102(6). If a defendant seeks probation, then he or she bears the burden of "establishing suitability." Id. § 40-35-303(b). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." Id. § 40-35-303, Sentencing Comm'n Cmts.

The following considerations provide guidance regarding what constitutes "evidence to the contrary:"

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant....

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence.

Defendant was convicted of a Class B felony and, therefore, is not considered a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6). However, Defendant is considered eligible for probation because the imposed sentences are "ten years or less," and the offenses for which he was convicted are not specifically excluded by statute. Id. § 40-35-303(a). The defendant bears the burden of demonstrating to the trial court that he or she is deserving of a sentence other than one of total confinement. See id. § 40-35-303(b).

Although Defendant challenges the trial court's review of the applicable enhancement factors, a trial court may consider the mitigating and enhancing factors set forth in Tennessee Code Annotated §§ 40-35-113 and -114, as they are relevant to the § 40-35-103 considerations in determining a defendant's request for alternative sentencing. T.C.A. § 40-35-210(b)(5). Thus, we conclude that the trial court did not err in considering in its sentencing determinations information about Defendant's previous history criminal convictions and his failure to comply with conditions of a sentence involving release into the community. See id. § 40-35-114(1); (8).

Defendant argues that there is no evidence in the record that he has a long history of criminal conduct. However, in the ten years since he turned eighteen, Defendant has accumulated three misdemeanor convictions and six felony convictions, most of them drug related. As the trial court observed, "when you look at his prior history, he's a drug dealer that won't quit dealing," notwithstanding the fact that he kept getting arrested for his activities. Specifically reviewing Defendant's recent criminal history, the trial court noted:

> and, according to this pre-sentence report, the last sentence . . . from the [2002] case, his [c]ommunity [c]orrections was revoked and he was ordered to serve four months in June of [2205]. So, he would've gotten out – I don't know what his jail credit was but, maybe, some time in the fall of [2005]; gets the investor to invest in studio time, and then, boom, in March he's back dealing cocaine; makes bond, career is still viable and then, boom, in May he's back, gone from five grams to nineteen grams of cocaine.

The trial court took into consideration Defendant's repeated failures to comply with the terms of probation or the community corrections program. The trial court acknowledged Defendant's denial that he had a problem with drugs, and found:

> [s]o, that [leads] the Court to believe what I was mentioning earlier, that he's a dealer, he's not a user. So, we've had these efforts for nine or ten years now. They haven't worked.

Based on our review, the record supports the trial court's finding that Defendant has a lengthy history of criminal convictions and has demonstrated failure at past rehabilitative efforts. Accordingly, we conclude that the trial court did not err in denying Defendant's request for alternative sentencing and ordering Defendant to serve his sentences in confinement.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE